

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

**Joint Petition of Verizon New England, Inc., d/b/a)
Verizon Vermont, Certain Affiliates Thereof, and)
FairPoint Communications, Inc. for approval of)
an asset transfer, acquisition of control by merger)
and associated transactions)**

Docket No. 7270

SURREBUTTAL TESTIMONY

OF

GARY J. BALL

ON BEHALF OF SOVERNET AND SEGTEL

AUGUST 10TH, 2007

1 **Q. ARE YOU THE SAME GARY BALL THAT FILED DIRECT**
2 **TESTIMONY IN THIS PROCEEDING?**

3 A. Yes. I am.

5 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY**

6 A. I will be responding to numerous assertions made by FairPoint witnesses Lippold
7 and Skrivnan in their rebuttal testimony regarding FairPoint's readiness to operate
8 as a wholesale provider, interpretation of the transition services agreement (TSA),
9 and the regulatory status of FairPoint after the transaction.

10

11 **Q. ON PAGE 12 OF HIS REBUTTAL TESTIMONY, MR. LIPPOLD**
12 **ASSERTS THAT FAIRPOINT IS EQUALLY POSITIONED WITH**
13 **VERIZON TO PROVIDE WHOLESALE SERVICES TO CLECS. DOES**
14 **HIS TESTIMONY SUPPORT HIS ASSERTION?**

15 A. No. Mr. Lippold's testimony describes a company that's still in the early stages
16 of the process of building a wholesale organization. Mr. Lippold acknowledges
17 that FairPoint has not yet hired or trained all of the personnel that will be
18 necessary to provide the same level of service as Verizon, nor have they
19 implemented all of the necessary systems. FairPoint's, incomplete, untested, and
20 inexperienced wholesale department and systems cannot be viewed as equivalent
21 to Verizon's fully functional organization and systems that were built over a ten
22 year period.

23

1 **Q. DO FAIRPOINTS' OWN FINANCIAL DISCLOSURES CONFIRM THE**
2 **RISKS AND UNCERTAINTY ASSOCIATED WITH FAIRPOINT'S**
3 **ATTEMPT TO BUILD A NEW WHOLESALE ORGANIZATION FROM**
4 **SCRATCH?**

5 A. Yes. In its recent S-4 registration filing with the Securities Exchange
6 Commission, FairPoint concedes the risks associated with the integration process
7 could be "exacerbated" by its lack of experience in providing "competitive local
8 exchange carrier wholesale services" as follows:

9 "All of the risks associated with the integration process could be exacerbated by
10 the fact that FairPoint may not have a sufficient number of employees to integrate
11 FairPoint's and Spinco's businesses or to operate the combined company's
12 business. Furthermore, Spinco offers services that FairPoint has no experience in
13 providing, the most significant of which are competitive local exchange carrier
14 wholesale services. FairPoint's failure or inability to hire or retain employees
15 with the requisite skills and knowledge to run the combined business, may have a
16 material adverse effect on FairPoint's business. The inability of FairPoint's
17 management to manage the integration process effectively, or any significant
18 interruption of business activities as a result of the integration process, could have
19 a material adverse effect on the combined company's business, financial
20 condition and results of operations." ¹
21

22 **Q. FAIRPOINT WITNESS LIPPOLD DISPUTES YOUR ASSERTION THAT**
23 **THE FINANCIAL TERMS OF THE TSA WILL PRESSURE FAIRPOINT**
24 **TO CUTOVER THEIR SYSTEMS PREMATURELY DUE TO THE**
25 **INCREASING FINANCIAL PENALTIES THAT ACCRUE AFTER THE**
26 **FIRST 12 MONTHS. DOES HE OFFER ANY SUPPORT FOR HIS**
27 **POSITION?**

¹ Amendment 3 to FairPoint Communications, Inc. S-4 Registration Statement, Subject to Completion June 29, 2007, p. 26

1 A. No. Mr. Lippold merely asserts that the penalties are not an issue because he is
2 confident that they will be finished within that timeframe.

3
4 **Q. WHAT EVIDENCE IS THERE THAT THE CUTOVER MAY TAKE**
5 **MORE THAN A YEAR?**

6 A. The Hawaii situation offers a direct example of how such a cutover can get
7 delayed to unforeseen issues. The parties to the Hawaii transaction were equally
8 confident in their ability to quickly manage such a cutover, and they are still
9 dealing with implementation issues 15 months after they cutover their systems
10 under their own TSA.

11
12 **Q. HAS FAIRPOINT ACKNOWLEDGED THE FINANCIAL PRESSURE OF**
13 **GOING BEYOND THE FIRST YEAR IN ANY OF ITS FINANCIAL**
14 **DISCLOSURES?**

15 A. Yes. In the same SEC S-4 filing noted above, FairPoint noted: “In addition, if
16 the combined company continues to require services from Verizon under the
17 transition services agreement after the one-year anniversary of the closing of the
18 merger, the fees payable by the combined company to Verizon pursuant to the
19 transition service agreement will increase significantly, which could have a
20 material adverse effect on the combined company’s business, financial condition
21 and results of operations.”²

22

² Id.

1 **Q. IN HIS REBUTTAL TESTIMONY [PAGE 26], MR. SKRIVNAN STATES**
2 **“FAIRPOINT WILL NOT CLAIM 251(F)(1) RURAL EXEMPTIONS AT**
3 **CLOSING OR IN THE FUTURE,” BUT “RESERVES THE RIGHT TO**
4 **APPROACH THE BOARD IN THE FUTURE SEEKING THE 2%**
5 **SUSPENSIONS AND MODIFICATIONS.” IS THIS CONSISTENT WITH**
6 **THE DIRECT TESTIMONY OF FAIRPOINT WITNESS NIXON ON THIS**
7 **MATTER ?**

8 A. No. Mr. Nixon’s testimony asserted that FairPoint “will not take the position that
9 this company is a rural telephone company entitled to exemption from Section
10 251(c) obligations under Section 251(f)(1) of the federal Communications Act, or
11 to suspension or modification of Section 251(b) or to (c) obligations under
12 Section 251(f)(2) of the Communications Act.”³. Mr. Skrivnan’s revelation in the
13 rebuttal round represents a significant and chilling change, the impact of which
14 could be a significant level of deregulation for FairPoint relative to Verizon.

15
16 **Q. WHAT WOULD BE THE IMPACT UPON COMPETITION IF**
17 **FAIRPOINT RECEIVED RELIEF AS A RURAL TELEPHONE**
18 **COMPANY UNDER SECTION 251(F)(2)?**

19 A. FairPoint would be relieved of critical 251 obligations, meaning that they, any
20 time in the future, could limit or even eliminate competitors access to unbundled
21 elements, cost-based pricing, and other general requirements of incumbent
22 carriers such as Verizon. Indeed, in his Vermont rebuttal testimony at page 27,

³ Prefiled Direct Testimony of Peter Nixon, p. 28, lines 7-11.

1 Mr. Skrivnan provides relief from TELRIC as an example of the relief that could
2 be obtained under Section 251(f)(2).
3

4 **Q. IS FAIRPOINT'S PROPOSAL TO RETAIN THE RIGHT TO SEEK THE**
5 **SUSPENSION OR MODIFICATION OF SECTION 251(B) AND (C)**
6 **UNDER SECTON 251(F)(2) CONSISTENT WITH ITS PLEDGE TO**
7 **MEET ALL OF VERIZON'S EXISTING REGULATORY OBLIGATIONS**
8 **TOWARDS ITS WHOLESALE CUSTOMERS?**

9 A. No. In fact, it is the exact opposite. FairPoint is intending to keep a major
10 deregulatory card in its back pocket for use at any time after the merger. If
11 FairPoint can suspend, modify, or even eliminate most of its key 251 obligations,
12 competition will obviously be much worse off. Even if FairPoint petitions for
13 relief and fails, competitors will still be forced to deal with the uncertainty and
14 litigation cost of the resulting proceedings to review the petition.
15

16 **Q. ARE THERE OTHER REGULATORY OBLIGATIONS THAT APPLY TO**
17 **VERIZON THAT FAIRPOINT IS SEEKING TO AVOID?**

18 A. Yes. FairPoint continues to assert that it is not and will not be a BOC or a
19 successor or assign to a BOC and that it will not be subject to Section 271 or other
20 obligations that apply to BOCs, such as Section 272.
21

22 **Q. MR. LIPPOLD STATES, AT PAGE 15 OF HIS TESTIMONY, THAT**
23 **FAIRPOINT IS MAKING SUBSTANTIAL COMMITMENTS, AND THAT**

1 **THE SUM OF THESE COMMITMENTS WILL ADD UP TO COMPLETE**
2 **SATISFACTION OF ALL THE SERVICES AND NETWORK ELEMENTS**
3 **THAT CLECS ARE CURRENTLY RECEIVING FROM VERIZON OR**
4 **HAVE REQUESTED IN THIS DOCKET. DO YOU AGREE?**

5

6 A No. In my direct testimony, I requested that FairPoint offer dark fiber loops, dark
7 fiber entrance facilities and dark fiber transport and line sharing as 271 elements
8 under a wholesale tariff or SGAT so that CLECs in Vermont would know that
9 they could purchase such items at just and reasonable and non-discriminatory
10 rates, just as they can in Maine. Sovernet and segTEL have repeatedly asked
11 FairPoint whether these items would be made available and if so at what rates,
12 terms and conditions.

13 In response to SOV/SEG:FP 3-1, FairPoint witness Lippold states that FairPoint
14 will not provide these services under a wholesale tariff to be approved by the
15 Board, but intends to offer these services by way of a confidential commercial
16 agreement. FairPoint continues to refuse to state what the rates, terms and
17 conditions would be for such services.

18 This proposal would put CLECs in a much worse position than they are currently
19 with Verizon. Voluntary commercial agreements would remove any incentive
20 that FairPoint has to deal fairly with CLECs, as it would remove the legal
21 obligations to make Section 271 network elements available, and also remove
22 obligations to make the rates for such elements just and reasonable. In addition to
23 removing the enforcement rights of CLECs, making such agreements confidential

1 would make it impossible for CLECs and regulators to determine whether CLECs
2 are being treated fairly, or if they are being discriminated against.

3
4 **Q. HAS FAIRPOINT OFFERED ANY COMFORT TO CLECS ON THIS**
5 **MATTER THROUGH DISCOVERY RESPONSES?**

6 No. In discovery, Sovernet and segTEL asked the following question in

7 SOV/SEG:FP 3-1(g):

8 “If FairPoint does not intend to reveal what the rates, terms and condtions are for
9 linesharing, dark fiber loops, dark fiber transport and dark fiber entrance facilities
10 in this proceeding, and intends to “offer” such services by way of agreements that
11 are not disclosed to the Board, what would stop FairPoint from demanding
12 excessive rates or onerous conditions that CLECs cannot agree to? If CLECs
13 cannot agree to the rates, terms and conditions that FairPoint seeks in agreements
14 that are not disclosed to the Board, and if FairPoint is not a BOC and not
15 generally subject to section 271, what remedies would a CLEC have?”

16
17 FairPoint’s response, provided in part, shows their cavalier attitude toward 271

18 obligations and their intention to offer 271 elements on a unilateral, take it or

19 leave it basis:

20 “Agreements with CLECs will be reasonable, or the CLECs will not enter into
21 them. The market for the facilities in question has been judged to be competitive;
22 CLECs are not deemed “impaired” by the absence of regulated access to these
23 elements. Therefore, there is no competitive need for a regulatory mandate
24 concerning these facilities. CLECs either will choose to enter into agreements
25 with FairPoint on commercially negotiated terms, or CLECs will choose to build
26 their own facilities or purchase them from a third party.”

27
28 Essentially, FairPoint is proposing to eliminate any recourse CLECs may have to

29 request arbitration or other types of enforcement actions with regulators over their

30 obligations to offer these elements. Additionally, they are attempting to

1 deregulate the separate and voluntary nature of the 271 obligations that Verizon
2 agreed to when it was permitted to enter the long distance markets.

3

4 **Q. HAS FAIRPOINT SATISFIED YOUR CONCERNS REGARDING THE**
5 **NEED FOR CONDITIONS?**

6 A. No. At page 27 of his testimony, Mr. Lippold rejects my recommendation that
7 the Board retain ongoing jurisdiction over FairPoint and Verizon while the TSA is
8 in effect, and that the conversion to FairPoint's systems should only be permitted
9 after a third party audit shows that FairPoint's systems are at least as good as
10 Verizon's. According to Mr. Lippold and Mr. Skrivnan, "the Board will be able
11 to review FairPoint's activities following the transaction, so there is no need for
12 such a condition."

13

14 The need for conditions is even more urgent after review of Verizon's cutover
15 plan which, at page 4, states as follows: *****begin confidential**

16

17 *****end confidential.**

18

19 **Q. ARE THERE OTHER FAIRPOINT POSITIONS THAT JUSTIFY**
20 **CONDITIONS AND REGULATORY OVERSIGHT?**

21 A. Yes. As stated above, FairPoint continues to insist that it is not a BOC and will
22 not be subject to sections 271 and 272, as Verizon currently is. This is

1 inconsistent with FairPoint's repeated statements that it will be subject to the
2 same regulatory requirements as Verizon.

3
4 Second, FairPoint witness Skrivnan states that FairPoint will comply with its
5 obligations as an ILEC under section 251, but seeks to retain its right to seek the
6 modification of its unbundling obligations under section 251(f)(2).

7
8 Third, Mr. Skrivnan states that FairPoint will abide by the Performance
9 Acceptance Plan (PAP). However, in response to SOV/SEG:FP 3-4(e), FairPoint
10 witnesses Haga and Kurtze state that "FairPoint anticipates that it will need a
11 grace period" of approximately 30 days prior to cutover and 90 days following
12 cutover when the metrics set forth in the PAP should not apply." It is important
13 to understand that the PAP will not alone compensate CLECs if there are
14 widespread system failures after the cutover because many of the standards are
15 based on parity. This highlights the importance of getting it right prior to cutover
16 and the need for a fund to compensate CLECs for damages if there are problems
17 with the cutover.

18
19 Fourth, Mr. Skrivnan states that FairPoint will agree to extend all intercarrier
20 agreements (including interconnection agreements) for one year following the
21 expiration date and will extend month-to-month agreements for one year. This
22 offer is inadequate in comparison to the voluntary agreements that Verizon agreed
23 to in connection with its merger with MCI, and the more recent voluntary

1 conditions that SBC agreed to in connection with its merger with BellSouth. With
2 respect to the latter, SBC agreed to extend interconnection agreements for at least
3 three years; agreed to a rate freeze on UNEs, tandem transit and special access for
4 at least 42 months, agreed not to seek forbearance under section 10 of the Act for
5 any loop or transport facility for at least 42 months and a host of other conditions
6 to ensure that the availability, cost and quality of wholesale services remained
7 stable.

8

9 **Q. DO YOU AGREE WITH MR. SKRIVNAN'S STATEMENT THAT THERE**
10 **IS NO BASIS FOR APPLYING THE AT&T/BELLSOUTH MERGER**
11 **CONDITIONS TO THE VERIZON/FAIRPOINT TRANSACTION?**

12 A. No. Mr. Skrivnan seems to suggest that conditions to mitigate harms to
13 competition are only appropriate if a transaction results in market concentration.
14 It is equally appropriate to apply conditions if the new owner appears to lack the
15 experience and resources to manage the transition to new systems and
16 organizations, especially when there is a historical precedent for similar
17 transactions going awry, such as the Hawaii transaction.

18

19 **Q. CAN YOU PLEASE SUM UP YOUR TESTIMONY?**

20 A. Yes. Despite FairPoint's continued assertions to the contrary, their proposal
21 remains incomplete, lacking both the necessary details and commitments
22 necessary to ensure that competition won't be harmed in the transition from
23 Verizon's operations to those of FairPoint to the detriment of the public good in

1 Vermont. As I demonstrated in my direct testimony and reiterated in this
2 testimony, FairPoint lacks the resources, experience, and incentive to comply with
3 the wholesale obligations it will take on as the predominant ILEC in Vermont.
4 Without proper conditions, the transfer of Verizon's assets to FairPoint will result
5 in increased costs and degraded service to wholesale providers. Vermont's end
6 users will ultimately pay the price if their existing competitive provider is no
7 longer able to provide the same levels of service or if competitors are forced to
8 limit or reduce their service offerings.

9

10

11 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

12 A. Yes it does.

13